

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LINDA SWOGGER

Claimant

VS.

KANSAS REHAB HOSPITAL, INC.

Self-Insured Respondent

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Docket No. **1,045,629**

ORDER

Self-Insured respondent requests review of the October 27, 2009 preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found that claimant suffered an aggravation to her preexisting back condition as a result of a work-related accident.

Respondent requests review of the issue whether the claimant met her burden of proof to establish she suffered an accidental injury arising out of and in the course of employment. Respondent argues that the delay in reporting the alleged accident raises a doubt whether the alleged incident happened at work. Respondent further argues that Dr. Dale Garrett's opinion that the alleged incident did not aggravate claimant's preexisting back condition is more persuasive than claimant's medical expert's opinion.

Conversely, claimant argues that although she had been receiving treatment for her back before the accident, nonetheless, she had been able to work. But after the accident she experienced pain in a different side of her back with radiculopathy into a different leg. And Dr. P. Brent Koprivica unequivocally opined that she had suffered a permanent aggravation to her preexisting back condition. Consequently, claimant requests the Board to affirm the ALJ's Order for Compensation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant worked as a floor nurse for the respondent's rehabilitation hospital since February 4, 2008. Claimant testified she had been diagnosed with a bulging disk in her back many years ago but was always able to continue working. She had also received epidural injections in her back in early 2009. This was for pain primarily on the right side of her back and down her right leg although she had received an injection in her left hip which she testified had alleviated the problem on that side.

In early April 2009, claimant was off work for two weeks because of a problem associated with a sleep apnea condition. She testified that when she returned to work after being off for those two weeks she was not experiencing any significant back pain.

On April 15, 2009, claimant was helping a 400-pound patient turn over in bed by pulling on the draw sheet when she felt pain in her mid back, down her left hip and leg. She self medicated and went to work the next day but had difficulty getting through the morning. By afternoon, she had increased pain as her medication had worn off. She testified that she did not immediately complete an accident report because of her preexisting back problems and that in the past she had been able to recuperate on her own by using analgesics, ice and rest.

When her back pain did not improve she reported her accident to Renae Pritchard on April 19, 2009. Respondent referred claimant for medical treatment with Dr. Garrett. After obtaining a history from claimant, Dr. Garrett performed an examination and concluded that because of her history of back complaints and treatment that her overall condition was not related to her work. Dr. Garrett specifically noted in his report:

MEDICAL DECISION MAKING: Explained to this patient that I believe based upon her history of recent injections and referral to a spine surgeon that her overall condition is not related to work. Even if there is the smallest probability there was an exacerbation of this by the above incident is [sic] did not aggravate it beyond her prior state.¹

But claimant testified that after Dr. Garrett examined her he had told her that the incident at work had aggravated her preexisting back condition. She testified:

Q. Okay. And he, in his report says, he didn't believe your injury was work-related?

A. At the end of the examination he told me he thought it was an aggravation of a pre-existing condition.

Q. Do you agree that your back problems that you're having now that you've had since April 15th, 2009 are related to your employment or not related?

¹ P.H. Trans., Ex. 1.

A. Yeah, it, it is related, I've never had pain in my left side, it's always been in my right.²

Because the doctor had told her that her condition had been aggravated by the incident at work the claimant completed an accident report for respondent and noted that she had aggravated a preexisting condition while pushing and pulling on a draw sheet.

Respondent denied medical treatment so claimant sought treatment with her family physician. She received some therapy and also was prescribed pain medication. At her attorney's request, claimant was examined and evaluated by Dr. P. Brent Koprivica. Dr. Koprivica opined claimant suffered a permanent aggravating injury to her lumbar spine caused by the April 15, 2009 accidental injury at work. The doctor recommended an MRI and referral to a neurosurgeon.

Claimant testified that before the April 15, 2009 accident her back pain was more right sided with intermittent pain radiating down her right leg. She further testified that after the incident her back pain included pain down her left leg. It is interesting to note that when claimant was examined by Dr. Koprivica she complained of severe ongoing back pain with pain in her right leg that radiates down to the right ankle and although she had some symptoms on the left it was noted the symptoms on the right were greater. And Dr. Koprivica concluded that he suspected a right-sided disk herniation.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.³ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.⁴

In this case the claimant was receiving treatment, including epidural injections for her back before the alleged work-related accident on April 15, 2009. But she was able to continue working despite the preexisting problems. After the incident at work her pain increased to the point that she was unable to continue working. The medical notes after April 15, 2009, from her personal physician confirm she complained of pain radiating into her left leg where before she had intermittent pain radiating into her right leg. Dr. Koprivica related her condition to a permanent aggravation due to the April 15, 2009 incident at work.

² P.H. Trans. at 8.

³ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁴ *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

And claimant testified that the incident worsened her back condition.⁵ Conversely, Dr. Garrett concluded there was no permanent aggravation but equivocated regarding whether there had been some aggravation and according to claimant he said she had suffered an aggravation of her preexisting back condition.

This Board Member finds, based upon the evidence compiled to date, that the claimant has met her burden of proof to establish that she suffered a work-related aggravation to her preexisting back condition and affirms the ALJ's Order for Compensation.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated October 27, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2010.

DAVID A. SHUFELT
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

⁵ See, *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001).

⁶ K.S.A. 44-534a.

⁷ K.S.A. 2008 Supp. 44-555c(k).